

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.** See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

**FILED BY CLERK**  
**MAY 14 2009**  
COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	
Respondent,	)	2 CA-CR 2008-0423-PR
	)	DEPARTMENT B
v.	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
JOSEPH ANTHONY OCHOA,	)	Rule 111, Rules of
	)	the Supreme Court
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20063956

Honorable Richard Nichols, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney  
By Jacob R. Lines

Tucson  
Attorneys for Respondent

Joseph Anthony Ochoa

Douglas  
In Propria Persona

B R A M M E R, Judge.

¶1 Pursuant to a plea agreement, petitioner Joseph Anthony Ochoa was convicted of attempted burglary, a dangerous, class three felony. The trial court sentenced him to an aggravated, twelve-year prison term, citing as aggravating circumstances Ochoa's criminal history and the trauma inflicted on the residents of the home he had invaded. In an unsuccessful petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P., Ochoa challenged the aggravated sentence. This pro se petition for review followed. Absent a clear abuse of discretion, we will not disturb the trial court's ruling. *See State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990).

¶2 In his petition for post-conviction relief, filed by appointed counsel, Ochoa contended the trial court erred in imposing the aggravated prison term because it had relied, in part, on his juvenile criminal history. Ochoa claimed that history was far too remote to serve as a proper aggravating circumstance. He suggested the court did not give adequate weight to the "substantial mitigating circumstances." The court denied relief without an evidentiary hearing, finding it had "properly consider[ed] [his] criminal history as an aggravating factor." The court further found that it had "considered the mitigation propounded by defense counsel and the contents of the presentence report."

¶3 In his pro se petition for review, Ochoa challenges his aggravated sentence on different grounds. Ochoa suggests the state was required to allege the aggravating circumstances or they had to be expressly included in the plea agreement. That argument, however, is being made for the first time on review, and we therefore need not consider it.

*See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (appellate court will not consider on review issues that “have obviously never been presented to the trial court for its consideration”). Moreover, Ochoa is confusing sentence enhancement with aggravation. His sentence was not enhanced with historical prior felony convictions. To the extent Ochoa might be suggesting he was entitled to have a jury determine the aggravating circumstances, he expressly waived any such *Blakely*<sup>1</sup>-based rights in the plea agreement. He also suggests his sentences should have been less because his codefendant’s sentences were not as severe. Not only was this improperly raised for the first time on review, *id.*, but his codefendant’s sentences do not affect the propriety of Ochoa’s sentences.

¶4 We grant the petition for review, but finding no abuse of the trial court’s discretion, we deny relief.

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J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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GARYE L. VÁSQUEZ, Judge

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<sup>1</sup>*Blakely v. Washington*, 542 U.S. 296 (2004).